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No. 809

In the Supreme Court of the United States

OCTOBER TERM, 1967

INTERSTATE COMMERCE COMMISSION, APPELLANT
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the district court (App. 1–21)[1] is reported at 268 F. Supp. 71. The report of the entire Interstate Commerce Commission (App. 49–69) is printed at 326 I.C.C. 77. An earlier report of the Commission, Division 2 (App. 24–48), is printed at 323 I.C.C. 758.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321–2325, to set aside an order of the In-

[1] "App." followed by a number refers to a page in the Appendix to the Jurisdictional Statement filed on behalf of the American Commercial Lines, Inc., and other water carriers, as separate appellants herein.

terstate Commerce Commission. The final judgment of the three-judge district court (App. 22–23) was entered on May 15, 1967. The Commission filed a notice of appeal on July 13, 1967; and the time for docketing the appeal was extended by District Judge Gordon until October 13, 1967. Subsequently, Mr. Justice Stewart entered an order further extending the time for docketing the appeal to and including November 9, 1967.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *American Trucking Associations, Inc.* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 387 U.S. 397; *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1.

STATUTE INVOLVED

Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3), provides:

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901 and 1001, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

QUESTIONS PRESENTED

The Interstate Commerce Commission found that the substantially reduced rate filed by certain railroads to capture traffic being handled in a joint barge-truck service, impaired the latter mode's inherent advantage of low cost, determined by comparison of fully distributed costs, in violation of the National Transportation Policy, *supra*. Although higher than the railroads' out-of-pocket cost of performing the

service, the reduced rate was filed at a level below the barge-truck fully distributed or average costs. The district court held that Section 15a(3) of the Interstate Commerce Act, *supra,* and the National Transportation Policy required the Commission as a matter of law to permit such a reduction. It further held that the Commission had not sufficiently explained and justified its use of a full-cost standard. The questions presented are, (1) whether the statute requires the Commission normally to allow railroads to reduce their rates to an out-of-pocket level in competition with bargelines; and (2) whether the Commission's reliance on a full-cost comparison was justified in the circumstances of the present case.

STATEMENT

With a tariff filed to become effective December 1, 1963, the Louisville and Nashville Railroad Company and the Pennsylvania Railroad Company proposed to reduce their rate on ingot molds and stools moving from Pittsburgh, Pa., to Steelton, Ky., 57 percent from $11.86 per ton to $5.11 per ton. The stated purpose of the reduction was to capture traffic that was then moving via a combination of barge and truck service at the rate of $5.11 per ton (App. 2 and 25–26). It was undisputed that at equal rates all such traffic would move by rail (App. 53).

The Commission suspended the proposed reduction for the full statutory period of seven months. The Commission did not conclude its proceedings and enter a final order within the seven-month period; the reduced rate, therefore, became effective on March

19, 1965, at the expiration of that period by operation of law, following a voluntary extension of the period.

At the hearing before a hearing examiner of the Commission, the railroads presented evidence that the proposed rate of $5.11 was substantially below their "fully-distributed costs" (computed by them at $7.59), but exceeded their "long-term out-of-pocket costs" (computed by them at $4.83). The railroads further presented the opinion testimony of four economists that, (1) the railroads would in general make greater profits by reducing some rates below their fully-distributed costs (but above out-of-pocket costs) when necessary to attract traffic; and (2) the railroads with their heavy fixed investments operate more efficiently when given this freedom to price their services at different price levels for different customers depending upon the value of the service. These witnesses stated that no comparison of water and rail costs should deprive the railroads of this opportunity to maximize their own profits.

The protesting barge lines, separate appellants herein, presented evidence that their fully-distributed costs, including a loading and unloading charge borne by the shipper-consignee, was $5.19 or a few cents more than the existing barge-truck rate. These water carriers showed that the instant traffic was one among a limited number of commodities handled by them; and further presented the opinion testimony of a transportation economist that water carriers must recover their full costs in order to survive.

A division of the Interstate Commerce Commission, composed of three members of the Commission,

accepted the parties' computation of their own costs (App. 27–28). The Division then held that the barge-truck mode possessed an inherent cost advantage over the railroads, based on a comparison of the full costs, but added (at 30–31) that in their opinion the advantage and the concomitant protection of the National Transportation Policy had been lost by the water carriers when their rate was voluntarily set at a level of a few cents below their full costs (App. 24–48; 323 I.C.C. 758).

Following the petition for reconsideration filed by the barge interests, and a petition and reply of the railroads, the entire eleven-member Commission entered the report of November 9, 1965, with two of the former members of Division 2 and one other Commissioner dissenting. The Commission concluded that a decision regarding the inherent advantage of low cost first requires "a comparison of the cost advantages of two competing modes of carriage." The question cannot be determined "*in vacuo,* by viewing the operations of a single carrier or mode, as urged by the respondents [the railroads]." (App. 54).

The entire Commission then agreed with the Division that the barge-truck mode possessed an inherent cost advantage based on a comparison of the full costs of that mode with the full costs of the railroads. The Commission found that the railroads had failed to show their service to be more efficient than the barge-truck service. "Merely because a carrier is able, without incurring an out-of-pocket loss, to handle certain traffic at rates below fully-distributed costs" may mean that such carrier will make greater profit than if it

did not handle the traffic, but "does not necessarily mean that the carrier is the more efficient of the two" (App. 56–57).

In such circumstances, "the Commission consistently has utilized the fully-distributed cost standard," and "under that standard the rail respondents here do not possess an inherent cost advantage." (App. 59).

The Commission added that the propriety of using that standard in the future either as a rule or on a case-by-case basis, was pending in another proceeding (App. 59).[2] "A radical departure from the fully-distributed cost norm as urged by the respondents would not be justified on the limited record here before us, particularly when such issues are to be determined on a comprehensive record in docket No. 34013." (*Ibid.*)

The entire Commission held that an inherent advantage cannot be lost by mistake or inadvertence, and is entitled to protection under the National Transportation Policy (App. 57–58). The Commission, with three dissents, thereupon reversed the Division and

[2] Besides finding no basis on the present record for departing from precedent, the Commission also stated that on the facts before it a fully-distributed cost standard would be more "fair" and "impartial" within the meaning of the National Transportation Policy. "The traffic here involved is of far more consequence to the barges than to the railroads. * * * [I]ron and steel products, which includes ingot molds, is the third most important commodity group transported in barge service, accounting for 10.81 percent of their total revenue. It is 1 of 11 commodity groups which account for 81.45 percent of the total barge revenue." The railroad's concept of "inherent cost advantage" under the Policy "would impair the ability of a carrier not only to compete but to exist." (App. 57).

ordered the rail tariffs cancelled (App. 49–69; 326 I.C.C. 77).

The district court at the suit of the railroads entered an opinion and judgment permanently enjoining the order of the entire Commission. The Department of Justice had in the meantime filed an answer supporting the plaintiff railroads; it urged the court on brief (p. 26), that the determination of inherent advantages under the statute must be left to the "judgment of the marketplace, as is normally the case in a free enterprise system," and a comparison of cost and service advantages is "not a relevant element of the rate proceedings."[3]

The district court held, first, that the burden was on the Commission to justify its use of a fully-distributed cost standard. The court would remand for "some explanation *why the standard* chosen by the Commission *measures* which carrier is more efficient in providing the service here involved" [emphasis theirs] (App. 9). But, regardless of the adequacy or inadequacy of the Commission's findings justifying its use of a fully-distributed cost standard, the lower court would nevertheless have remanded. As the court states, "It is our belief that the Commission's order

[3] The position represented a reversal of the position stated by the United States in *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.*, No. 108 (Oct. Term 1962), reported at 372 U.S. 744 and cited herein as the *New Haven* case. There the Department argued on brief that a proposed rate destroys a cost advantage "when the low-cost carrier is unable to fix a rate which * * * covers its fully distributed costs * * *" (p. 40–41). The Department would have required a rate differential based on the difference in the fully-distributed costs of the two competing modes (at 15, and 40–41).

is based upon a misinterpretation or misapplication of the relevant statutory provisions" (App. 14).

The lower court states "that the underlying purpose of Congress in enacting Section 15a(3) was to direct the Interstate Commerce Commission to observe the original intent of Congress in 1940 and to restore and adhere to the policy set forth in *New Automobiles*[4] with respect to the preservation of inherent advantatges" (App. 15). This twofold purpose of Congress in enacting Section 15a(3) means to the lower court "that carriers should normally be free to offer rates which are compensatory, *i.e.*, above relevant out-of-pocket costs" (App. 20). As a matter of law, in its view, "the National Transportation Policy would not prevent carriers from establishing rates which exceeded out-of-pocket costs in the kind of situation here presented" (App. 16).

THE QUESTIONS ARE SUBSTANTIAL

In ruling that, as a matter of law, the Commission is normally powerless to interfere with proposed railroad rate reductions to the level of their out-of-pocket costs, an indicium most favorable to the railroads when competing with barge lines, the lower court misreads Section 15a(3) and its legislative history, as well as this Court's *New Haven* decision analyzing both at length. Hence, this Court again is asked to address itself to "but another episode in the long and continued struggle between the railroads and competing barge lines." *Mechling Barge Lines* v. *United States*, 376 U.S. 375, 376.

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[4] *New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1945).

1. The lower court interprets Section 15a(3) of the statute as giving everything to the railroads that years of effort failed to attain, namely, a rule of law allowing them to reduce their rates to an out-of-pocket level to capture the traffic of a competing water carrier. This Court reviewed the legislative history of Section 15a(3) in detail in *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744. This Court specifically noted that Congress had decided against a rule of law that would have rendered the Commission "powerless to reject a railroad rate which covered the railroad's out-of-pocket costs, even if that rate had the effect of destroying the inherent advantages of a lower-cost carrier" (at 755).

This Court expressly reserved decision in *New Haven* on which cost measure should be used to decide the question of inherent advantage (at 760); but in so doing it made clear the Commission was not precluded from using a full-cost standard. On the contrary, noting that Representative Harris in this connection had referred to a rate that was "fully compensatory" (at 757), this Court added:

> the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed cost, forced a smaller competing *lower cost* mode to go below its own fully distributed cost and thus perhaps to go out of business (at 758). [Emphasis as stated in the opinion.]

The *New Haven* opinion properly, we believe, treats the question of inherent advantage as one within the primary jurisdiction and discretion of the Commission. It is a question of "utility," a question of which measure may be "preferred for comparing the costs of two or more modes of transportation." (at 760, note 13). The lower court, however, rigidly frames its norm as a statutory mandate; and deprives the Commission of discretion to develop a standard or even to respond to the particular circumstances of a given case. Under the ruling of the lower court, the Commission is precluded under any circumstances, including the broader investigation now pending, from disapproving any rate that is above the out-of-pocket costs of the proponent mode even though another mode's inherent advantage of low cost is thereby impaired. We submit the lower court must be reversed for the Commission to regain its primary jurisdiction in this area.

2. The lower court states that Congress by enacting Section 15a(3) in 1958 directed the Commission "to observe the original intent of Congress in 1940" when it enacted the National Transportation Policy (App. 15);[5] the court then proceeds to misread the history

[5] The lower court also refers to the decision in *New Automobiles*, *supra*, to support its out-of-pocket rule. The *New Automobiles* decision involved rail reductions to meet motor carrier competition. The decision on its face shows that the motor carriers there did not assert an inherent advantage of low cost, but rather sought to save their revenues "from further depletion, and to prevent the extinction of the motor common carriers" (259 I.C.C. at 530). The Commission simply held, "there appears no warrant for believing that rail rates * * * should be held up to a particular level to preserve

of that Policy as favoring an out-of-pocket rule of law.

Representative Lea, Chairman of the House Committee which heard the bill and Chairman of the House conferees, specifically requested the views of the Commission on a bill that would have required the Commission to "give due consideration to the undesirability" of allowing any carrier to establish rates below "full costs" where "such rate * * * is maintained to meet competition."[6] Commissioner Eastman responded in a letter of March 20, 1939, that the Commission would prefer no statutorily prescribed cost standard in the absence of "sufficient experience in fixing minimum rates." He suggested that Congress "for the present * * * permit the Commission to be guided in this respect by the general rate-making rules * * * and by the general declaration of policy."[7]

So strong was the Congressional belief that the railroads might be favored by the Commission over the water carriers, that both houses of Congress in the so-called Miller-Wadsworth amendment would have required that the Commission permit reduced rates *only*

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a motor-rate structure, or vice versa" (at 538). *New Automobiles* was cited by Congress in 1958 only for the proposition that rail rates should not be held up to preserve a motor-rate structure. See *New Haven* case, 372 U.S. at 757; and see S. Rep. No. 1647, 85th Cong., 2d Sess., p. 3 (1958); H. Rep. No. 1922, 85th Cong., 2d Sess., p. 14 (1958).

[6] H.R. 2531, 76th Cong., 1st Sess., sec. 41.

[7] Letter from the Chairman of the Legislative Committee, Interstate Commerce Commission, to the Chairman of the Committee on Interstate and Foreign Commerce, House Committee Print, 76th Cong., 1st Sess., p. 7 (1939).

to the extent the reductions covered full costs.[8] The conferees opposed such an inflexible rule of law, and it was not enacted.[9] The Congressional rejection of a full cost rule of law for all cases cannot be read, contrary to the opinion below (*e.g.* App. 19–20), as the positive enactment of an equally inflexible out-of-pocket rule of law.

Although Congressman Wolverton, one of the conferees, spoke against the Miller-Wadsworth amendment (See App. 20), he added, "The bill, as it stands, also fully protects one type of common carrier from unfair rate-cutting competition by another having higher costs."[10] Far from believing "that such a restriction on competition would be extremely undesirable" (App. 20), Congress intended the National Transportation Policy to protect the water carriers from rate-cutting that deprived them of an inherent advantage of lower costs. As Congressman Halleck stated, the statutory reference to "inherent advantages,"

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[8] See, *e.g.*, the remarks of Senator Miller who sponsored the amendment in the Senate, 84 Cong. Rec. 5881. The text of the amendment is set forth in the opinion below (App. 19, note 5).

[9] The amendment was adopted both in the Senate (84 Cong. Rec. 6074) and in the House (at 9977); but the conference committee refused to report it out of conference. The conferees recognized that many rates on bulk commodities (grain, coal, etc.) were set below a full cost level, since those commodities would not move at the higher rate level. 86 Cong. Rec. 10179, remarks of Congressman Lea; *id.* at 10191, remarks of Congressman Wolverton; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 87 (1940). The amendment, therefore, would have required increases in many existing rates that were pegged at the lower level for reasons entirely unrelated to the inherent advantages of competing modes of transportation.

[10] 86 Cong. Rec. 10191.

> means a recognition of the rights of the country to cheap and economical transportation by water, that there are certain advantages inherent in that type of transportation and that these advantages shall be preserved to the people of this country.[11]

3. In *New Haven,* this Court reviewed in detail the history of Section 15a(3) and the Congressional rejection of the rule of law adopted below. Congress rejected the "three-shall-nots," first proposed in 1955, since the Commission had "expressed concern * * * it would be powerless to reject a railroad rate which covered the railroad's out-of-pocket costs, even if that rate had the effect of destroying the inherent advantages of a lower-cost carrier." (372 U.S. at 754–55). The Commission was not to be required to accept a railroad's showing of out-of-pocket costs as foreclosing further inquiry into which carrier possessed an inherent advantage of lower costs; as the Commission had stated before Congress, "in many instances * * * the full cost of the low-cost form of transportation exceeds the out-of-pocket cost of another." (372 U.S. at 755).

4. The lower court also found error in the Commission's findings regarding how or why the full-cost standard measures the inherent advantage of low cost.[12] The railroads made the present record

[11] 84 Cong. Rec. 9711.

[12] The court below also questions whether it is "unrealistic in comparing the relative efficiency of the two modes" to include an apportionment of the passenger and less-than-carload deficits in the computation of rail full costs (App. 9). This Court has held that the Commission reasonably includes this cost of doing rail business in the computation of full costs (*King* v. *United*

before the Commission seeking to establish the principle, since abandoned before the lower court,[13] that the Commission should not compare railroad costs with the costs of any other mode.[14] Rather than make a frontal attack on the full-cost standard theretofore used by the Commission, the railroads urged, (1) they would operate more profitably if allowed to reduce rates to an out-of-pocket level whenever necessary to meet competition; and (2) they would make greater and more economic use of their own resources if allowed to make such reductions. Their witnesses made no effort to compare the relative performance of rail versus water carriage, nor to measure the relative efficiency of the two modes in performing the same transportation service. The Commission properly responded in these circumstances that there was no showing before it that the railroads were "more efficient" than the competing barge lines (App. 56–57), and hence the Commission would adhere to its prior

States, 344 U.S. 254, 266–67); a witness for the railroads stated the same thing (Exh. 38, p. 23); but in any event these deficits here amounted to less than 67 cents out of the rail full cost of $7.59, and their omission would not have changed the result.

[13] Compare the opening Brief of the Railroads in the district court (p. 18) with the Reply Brief of the Railroads (p. 8).

[14] See Exh. 37, pp. 5, 12–16, 25, Att. p. 9; Exh. 38, pp. 18–21, 22–23, 30; Exh. 39, pp. 17–19; Exh. 40, p. 7. Although the last railroad witness conceded that railroads uniquely have excess capacity (Exh. 40, p. 4), he also stated (at 8), uniquely among the witnesses (*e.g.* compare Exh. 38, pp. 20–21, 27–28), that, "where the intermediate long-run incremental cost of another transport industry is above that of railroads (for service of equivalent quality) that other industry is not as economically efficient as the railroads."

use of fully-distributed costs since a "radical departure" has not been "justified on the limited record here before us" (App. 5).

The proceeding below was not the first to be decided under Section 15a(3) following this Court's decision in *New Haven*. In each case, the Commission decided the issue of inherent cost advantage on the basis of fully-distributed costs.[15] We submit that the railroads bore a burden, which they failed to carry, of proving to the Commission that their proposed measure of the inherent advantage of low cost better tested the relative efficiency of competing modes than the established standard.[16] The Commission's summary rejection of an out-of-pocket standard in these circumstances was fully justified.

CONCLUSION

The lower court's rule of law deprives the Commission of its primary jurisdiction to protect and preserve

[15] *Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind.*, 321 I.C.C. 121, 128–30 (1963); and cases cited by the entire Commission in its present report, App. 59.

[16] See and *cf. New Haven*, 372 U.S. at 760, note 12; *Brotherhood of Maintenance of Way Employes* v. *United States*, 221 F. Supp. 19, 28 (E.D. Mich. 1963), aff'd per curiam 375 U.S. 216; *Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98, 103 (N.D. Ohio 1963). In *New Haven*, the Supreme Court admonished that the proponent of a rate (here the railroads) should show the proposed rate to be compensatory, and it would be for the protesting carrier to persuade the Commission of the existence of an inherent cost advantage. We submit that when the protesting carrier shows the existence of an inherent cost advantage in terms of the existing measure employed by the Commission the burden then shifted to the railroads, seeking to upset that measure, to convince the Commission of the existence of a yardstick of greater "utility."

the inherent advantage of low cost as between competing modes of transportation. The Commission's findings adequately explain its rejection of an out-of-pocket cost yardstick, for comparing the two modes, particularly in view of the limited record before it and the current pendency of its broader investigation in Docket No. 34013.[17]

Probable jurisdiction should be noted and the judgment below reversed.

Respectfully submitted.

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[17] The Commission in the present proceeding expressly referred to *Rules to Govern the Assembling and Presenting of Cost Evidence*, Docket No. 34013, as the proceeding in which it would give more precise consideration to the measure of inherent cost advantage (App. 59).

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